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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

LEBARRON KEITH WILLIAMS,

Defendant and Appellant.

C025458

(Super. Ct. No. 95F07383)

OPINION ON RETURN
FROM SUPREME COURT

A jury convicted defendant Lebarron Keith Williams of assault with a firearm on Gregory King (Pen. Code, § 245, subd. (a)(2)) and found he personally used a firearm in the commission of the offense (Pen. Code, § 12022.5, subd. (a)(1)).¹ The jury deadlocked and a mistrial was declared on two counts of assault with a firearm (on King's sons) and one count of discharging a firearm at an occupied vehicle (Pen. Code, § 246). Imposition

¹ Undesignated statutory references are to the Penal Code.

of sentence was suspended and defendant was placed on probation for five years on the condition he serve nine months incarceration.

In a decision rendered December 9, 1998, this court reversed the judgment of conviction on the ground the jury was not properly instructed on the meaning of assault pursuant to former CALJIC No. 9.00 (1994 rev.), an element in the offense of assault with a firearm (Pen. Code, § 245, subd. (a)(2)). The Supreme Court granted review and by a decision, filed August 23, 2001, reversed the judgment of this court and remanded the case for further proceedings consistent with its opinion in *People v. Williams* (2001) 26 Cal.4th 779.

We will affirm the judgment.

FACTS

King married Deborah Nicholson in September 1989. They divorced 13 days later after King was sent to prison. Following his release from custody, they resumed their sexual relationship and lived together a portion of the time. Beginning in 1992, Nicholson also had a sexual relationship with defendant. In late 1994, she gave birth to a child but she did not know which of the men was the father.

Defendant and King were antagonists competing for Nicholson's favors. They had several confrontations, at least one of which developed into a fist fight. On another occasion, King pretended to aim a handgun at defendant as he was leaving Nicholson's apartment.

On August 5, 1995, King telephoned Nicholson several times to confirm their plan to go skating with his teenage sons and her baby. However, defendant was with Nicholson at the time. Each time King called, Nicholson told him she was busy. Eventually she unplugged the telephone.

Shortly thereafter, King and his sons drove in his small pickup truck to Nicholson's apartment. King parked at the curb, right in front of her house. A 15-foot lawn separated the sidewalk from the house. King noticed that defendant's pickup truck was parked in the driveway.

King went to the front door and knocked. When no one answered, he returned to his truck and got some paper and a pen. He wrote Nicholson a note which he placed by the front door. He then walked back toward his truck.

Defendant answered the door and yelled out to King, "What are you doing here?" Defendant returned briefly to the inside of the apartment, put on a shirt, opened the front door and walked outside toward his truck. By this time, King had returned to his own truck and was standing next to it. His sons were standing nearby. Defendant unlocked and opened his truck, retrieved a shotgun from behind the seat and loaded two shotgun shells. King told his sons to get into his truck; he attempted to do likewise. As King entered the truck, defendant fired one shot which hit its right rear tire. King drove away. Defendant left soon after.

Defendant was arrested on August 23, 1995. A loaded 12-gauge shotgun was found behind the seat of his truck.

Defendant testified to the ongoing hostility between himself and King. King had made physical and verbal threats toward defendant and Nicholson. King had told defendant he intended to kill him. Nicholson also described acts of violence by King. During arguments he spat on her twice and once ripped her blouse. He frequently sat outside her apartment and stalked her. He once wrote graffiti on her walls. On another occasion he choked her. About a week before the assault in this case, he left a message on her answering machine stating he was going to "bring" her and defendant "down."

On the date of the incident, King announced his presence at Nicholson's apartment by banging loudly on the door. Defendant thought "somebody was trying to kick the door in." Through the peephole he saw that the banger was King, who had since retreated and was kneeling on the opposite side of his truck. In light of the previous threats, defendant felt threatened by King's behavior. He believed King had a gun. Defendant was concerned for his safety and the safety of Nicholson and the baby.

King yelled at defendant, "You better get your gun." Defendant did so. He had a good view of the bed and cab of King's truck; there was no one inside. When defendant fired his shot, King was outside the truck approximately one and one-half feet away. Defendant did not see either of King's sons until after the shot was fired. Defendant testified he fired the shotgun as a warning shot, without intending to hit King or his sons. Defendant did so in order to protect himself, Nicholson

and the baby. The shotgun pellets struck the truck's rear wheel well because "[t]hat's because where [he] aimed the gun."

Nicholson testified that, before the shooting, King taunted defendant, seemingly to goad him into using the weapon. After defendant fired the shot, King had a smirk on his face.

DISCUSSION

I

In *People v. Williams*, *supra*, the Supreme Court held that, although the instruction given on assault (former CALJIC No. 9.00) did not wholly conform to the definition of assault it discerned in section 242, "any minor ambiguity in the instruction was harmless beyond a reasonable doubt." (26 Cal.4th at p. 790.) It reversed the contrary judgment of this court. Accordingly, it remains only for us to decide the issues not resolved by the Supreme Court.

II

Defendant contends the trial court abused its discretion by excluding the specific facts of King's 1984 assault of his then-girlfriend who was attempting to end their relationship. We are not persuaded.

Background

Prior to trial, defense counsel made an in limine motion to admit King's 1984 conviction of assault with a deadly weapon. He also sought to introduce the victim's testimony as to the facts of the assault. Defense counsel represented that the victim, Ms. Jasper, had been romantically involved with King but had wanted to terminate the relationship. This angered King

such that he rammed Jasper's car three times with his own. Jasper's car was wrecked and she was admitted to a hospital. At the time of this offense, Nicholson knew of the prior incident. However, defendant candidly admitted he did not know of the incident. Defense counsel informed the court that Jasper was reluctant to testify regarding the assault and intended to refuse to testify.

The trial court ruled it would not permit defendant to "call Jasper for painting a muddy picture of a twelve-year-old incident unknown to [defendant], and therefore, not part of his reasoning process, unknown except insofar as it came to his attention by way of discovery out of this incident." The court explained the issue posed "a close question on relevance," in light of Evidence Code section 1103, but the evidence's "staleness" and "it's not being known to [defendant]" warranted exclusion under Evidence Code section 352.² The court stated defendant could "explore fully" the relationships between defendant, King and Nicholson, and it denied the People's motion to sanitize the prior conviction, "so that the question can

² Further statutory references are to the Evidence Code. Section 1103 provides in relevant part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

properly be, 'Were you convicted in 1984 of assault with a deadly weapon?'"

During the prosecution's case-in-chief, King admitted he had been convicted of assault in 1984, accessory to burglary in 1985, and possession for sale of narcotics in 1989.

Analysis

Defendant contends the "evidence that King had violently attacked a former girlfriend because she was trying to end their relationship showed that he had a disposition for violence toward former female relationships." Defendant claims this evidence supported his arguments that King later acted violently toward Nicholson, and that defendant "knew of King's violent past and feared that on [the day of the offense King] was coming over to Nicholson's residence to commit violent acts upon" defendant, Nicholson or both. We are not persuaded.

"To justify an act of self-defense for [an assault charge under Penal Code section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and ' . . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065, orig. italics.)

The reasonableness of the defendant's use of force is evaluated objectively, from the viewpoint of a reasonable person in the defendant's position and *with similar knowledge*. The jury must consider all the facts and circumstances in

determining whether he acted in a manner in which a reasonable man would act in protecting his own life or bodily safety.

(*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.)

"A person claiming self-defense is required to "prove his own frame of mind," and in so doing is "entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear." [Citation.]'" (*Minifie, supra*, 13 Cal.4th at p. 1065.) "[T]he defendant is entitled to consider prior threats, assaults, and other circumstances relevant to interpreting the attacker's behavior." (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1189, disapproved on other grounds in *Humphrey, supra*, 13 Cal.4th at p. 1089.)

Although defendant knew *generally* of King's violent past, he admitted at trial that he did not know specifically of King's assault on Jasper. As the trial court recognized, an assault unknown to defendant does not aid in evaluating the reasonableness of his use of force, since such evaluation must be made from the viewpoint of a reasonable person *with knowledge similar to defendant's*. (*Humphrey, supra*, 13 Cal.4th at pp. 1082-1083.) Defendant simply could not have feared King based on a specific incident of which he was unaware.

Even if King's prior assault was relevant to show his character for violence within the meaning of section 1103, and thus was circumstantial evidence of his later violence toward Nicholson, it remained subject to ordinary evidentiary rules including section 352.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125, orig. italics.)

We find no abuse of discretion. The trial court admitted evidence of King's 1984 assault conviction and excluded only the underlying facts. Because those facts could be proved only through the testimony of a reluctant witness, and offered only a stale glimpse at King's behavior with a different woman, the trial court could find the evidence's probative value was slight. On the other hand, the evidence tended to evoke an emotional bias against King as an individual based on an incident which had very little effect on the issues. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Under these circumstances, the trial court could find the evidence's probative value was outweighed by its prejudicial effect. (*Rodriguez, supra*, 8 Cal.4th at pp. 1124-1125.) There was no error.

III

Defendant contends the trial court failed to instruct the jury sua sponte on the lesser included offense of simple assault. He reasons that, "[i]f the jury believed [him] when he testified that he was simply firing a warning shot, not aiming at King to harm him and his children, then it could have concluded that his conduct amounted to simple assault." We are not convinced.

"[A] trial court must, sua sponte, or on its own initiative, instruct the jury on lesser included offenses 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Barton* (1995) 12 Cal.4th 186, 194-195, quoting *People v. Seden* (1974) 10 Cal.3d 703, 715, fn. omitted.)

The evidence was susceptible to two interpretations. In the People's view, defendant assaulted King with a firearm. In defendant's view, he fired a "warning shot" in a justifiable act of self-defense. In that scenario, there is no offense at all and thus no "'offense . . . less than that charged.'" (*Barton, supra*, 12 Cal.4th at p. 195.) Because defendant never assaulted King *without* using the firearm, instructions on simple assault were not required.

IV

Defendant contends the trial court's definition of reasonable doubt, as embodied in CALJIC No. 2.90, "permits a

finding of guilt on a lesser showing than required by the due process clause." We disagree.

Defendant's argument is contrary to several appellate decisions, including *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022, *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896, *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815-816, *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263, *People v. Light* (1996) 44 Cal.App.4th 879, 884-889, and *People v. Torres* (1996) 43 Cal.App.4th 1073, 1077-1078. On the basis of these authorities, we too reject the argument.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P.J.

We concur:

DAVIS, J.

RAYE, J.